

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

PCL CONSTRUCTION SERVICES, INC.,¹

Employer,

and

Case 27-RC-8605

CARPENTERS DISTRICT COUNCIL
OF KANSAS CITY AND VICINITY,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On April 30, 2010, Carpenters District Council of Kansas City and Vicinity (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent the carpenter craft employees employed by PCL Construction Services, Inc., (Employer). On May 11, 2010, a hearing was held before Hearing Officer Renee C. Barker. Following the close of the hearing, the Employer timely filed a post-hearing brief.

The only issue to be resolved in this proceeding is the supervisory status of the four general foremen. The Employer contends, contrary to the Petitioner, that the general foremen possess and exercise the Section 2(11) supervisory indicia to hire,

¹ The correct legal name of the Employer appears as amended at the hearing.

transfer, suspend, layoff, promote, discharge, assign, discipline and direct employees, and accordingly, must be excluded from the petitioned-for bargaining unit.

I conclude that the Employer has met its burden of establishing that the general foreman have and exercise the Section 2(11) authority to hire, transfer, and lay off employees, and to assign and direct the work of employees using independent judgment by assigning them to specific work locations, tasks, and overtime. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). Accordingly, I shall exclude the general foremen from the unit.

STATEMENT OF THE CASE

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²
2. The parties stipulated, and I find, that the Employer, PCL Construction Services, Inc., is a Colorado corporation engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the Employer has a facility located in Denver, Colorado, where it is engaged in the general building construction industry throughout the State of Colorado. During the last calendar year, the Employer purchased and received at its Denver, Colorado facility, goods and services valued in excess of \$50,000 from suppliers located outside the State of Colorado.
3. The labor organization involved claims to represent certain employees of the Employer.

² The record reflects that the Petitioner issued a subpoena duces tecum to the Employer, and the Employer timely filed a motion to quash. The Employer's motion was referred to the Hearing Officer for ruling. At the close of the hearing, the Petitioner informed the Hearing Officer that it declined to pursue further any issues related to its subpoena on the basis that it did not want to delay my ruling on the supervisory status of the general foremen, but requested that I draw an adverse inference from the Employer's failure to produce the subpoenaed documents. I find that it would be inappropriate to draw an adverse inference based on the fact that the Petitioner declined to pursue its subpoena request and allowed the Hearing Officer to close the record.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:³

Included: All full-time and regular part-time foremen, journeymen, apprentices, and provisional employees performing work in any branch of the carpentry trade for the Employer on any jobsite in Colorado.

Excluded: Professional employees, clerical employees, laborers, guards, and supervisors as defined by the Act.⁴

STATEMENT OF FACTS

A. Background

The parties stipulated that the Employer and Petitioner have had a collective-bargaining relationship since at least 1980. The most recent collective-bargaining agreement was in effect by its terms from May 1, 2007 through April 30, 2010. Under the terms of that agreement, general foremen were included in the bargaining unit, and their terms and conditions of employment were identical to that of the other bargaining unit employees except for their wage rate. The agreement provided that journeymen had a base wage rate of \$22.50 per hour, plus fringe benefit contributions. Foremen were paid \$1.50 per hour above the journeymen base rate. General foremen were paid \$2.50 per hour above the journeymen base rate.

³ The parties also stipulated that voter eligibility should be determined by the *Daniel/Steiny* construction industry eligibility formula. See *Daniel Construction Company*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992).

⁴ This unit description does not comport with an amendment offered by the Petitioner at the start of the hearing without objection by the Employer only insofar as it does not reference the 2007 to 2010 AGC Building Construction Master Agreement with Petitioner. I note that the jurisdictional language in that agreement is several pages long and such language is not necessary to describe the appropriate unit in this case. The parties specifically stipulated that foremen are not statutory supervisors and should be included in the unit. Since the record evidence supports this stipulation, I am including the foremen in the unit.

B. The Employer's Operations

The Employer is a general contractor specializing in concrete and rough carpentry work. It has operations throughout the United States and Canada. The only operations at issue herein are its Colorado operations. The Employer subcontracts much of its bid work, but "self-performs" certain concrete and rough carpentry work, including laying foundations, structural slab work, interior blocking for millwork, and setting metal door frames. It maintains a core group of approximately 20-30 carpenters and utilizes the Union's hiring hall for additional manpower. The Employer's projects fall into two main categories: large scale commercial construction projects such as airports and hotels, and so-called specialty projects, which can range in cost from \$50,000 to about \$5 Million. Examples of large projects include construction of Denver International Airport, the Ritz-Carlton Hotel in Vail, Colorado, and Vestas in Pueblo, Colorado. The specialty projects usually involve remodeling, or so-called "tenant builds," which entail building the interior of a building to a tenant's specifications.

The managerial and supervisory hierarchy under the Employer's corporate level consists of a construction manager, district managers, project managers, general superintendents, and area superintendents. On a large commercial project it is common for the Employer to utilize a project manager, a general superintendent, several area superintendents, a general foreman, and as many as six carpenter crews.

The project managers are assigned to oversee either one large project or several smaller "specialty" projects running at the same time. Depending on the size and scope of the project, there will be one or more superintendents reporting to the project manager on large projects, and either a superintendent or a general foremen reporting

directly to the project manager on a specialty project. The responsibility of the project manager is to oversee the overall project to make sure the project comes in on time and on budget. The project managers are not involved in direct supervision of bargaining unit employees, although a general foreman in charge of a specialty project may seek the project manager's advice if the general foreman wants a second opinion about a personnel matter.

The Employer currently employs four general foremen who report directly to superintendents on large projects or the project manager on specialty projects. The general foremen, in turn, have from one to six carpenter crews reporting directly to them. These crews consist of a foreman and combinations of journeymen and apprentice carpenters.

On really large projects, there can be a general superintendent, and several area superintendents reporting to the general superintendent. The area superintendents are responsible for specific aspects of the project such as the exterior of the building, several levels of the interior of the building, or a specific construction area such as the swimming pool area. The area superintendents are responsible for coordinating the subcontractors to maintain the overall project schedule. They also determine the daily and weekly work schedules for the self-performed work, which are given to the general foremen at daily meetings, and at the Wednesday morning project meeting. Finally, the superintendents are responsible for all safety and quality control issues on the project.

The Employer has between 2-15 specialty projects on-going at any given time. About half of the projects are overseen by a superintendent. The other half are overseen by a general foreman who is the highest level manager on the project at all

times since the project managers are responsible for more than one specialty project at the same time. On projects overseen by only a general foreman, the general foreman will report directly to the project manager regarding the status and budget, and will perform all the same functions as a superintendent including scheduling and overseeing subcontractors and directly managing and supervising any self-performed work crews. This includes transferring PCL employees in from other projects, seeking hiring hall dispatches if needed, disciplining employees, and laying off or transferring employees out as the project winds down or is completed.

Everyone is required to wear a hard hat on all construction work sites. The general foremen and superintendents wear white hard hats, which signifies that they are in charge and if anyone on the project has a problem, they can take it to the white hard hat people. The foremen, and craft employees wear green hard hats.

C. General Foremen

1. General duties and responsibilities:

The general foremen have from one to six crews reporting to them, depending on the size and stage of the project. On some projects the general foremen will report to the general superintendent. On really large projects, the general foremen may report to the general superintendent and to any area superintendents who have self-performed work in their area. While the superintendents oversee the work area generally, and are specifically responsible for overseeing the subcontractors, the general foremen are responsible for the crews self-performing the actual carpentry work. In this regard, the superintendents provide information to the general foremen about the nature of the work to be performed, and the general foremen disperse the crews to the work areas and

tasks. The general foremen also make sure the tools and materials and supplies are available for the work crew. The general foremen spend the majority of their time either in the general foremen's office processing paperwork and reviewing blueprints, building plans, and schedules, or roaming from crew to crew, handling problems, and assessing manpower needs, the work progress as it relates to quality of the work, the schedule, and any equipment and material needs. The general foremen rarely perform actual carpentry work. The only time they work with tools is at the start or end of a project, or when training a carpenter on a specific task.

The general foremen attend three types of meetings. They attend the bimonthly superintendent meetings, which include all of the Colorado superintendents and general foremen. These meetings are not attended by foremen, except in rare circumstances. At these superintendent meetings, the superintendents and general foremen go over new safety rules, are introduced to new construction materials, are informed of upcoming projects, and discuss the progress and manpower situations at all ongoing projects.

The general foremen also attend the weekly Wednesday project meeting which includes the project manager, superintendents, general foremen, and foremen for all crafts including carpenters. At these meetings, the attendees review the minutes from the past week, discuss the current status of the project, and review the up-coming schedule. They also discuss safety and manpower concerns. Finally, the general foremen meet with the superintendent at the start of each day to outline the work schedule for the day. In turn, the general foremen meet with the crew foremen to relay the daily schedule and disperse the crews to the various work areas.

2. Authority to hire, transfer, and layoff employees:

General foremen are usually among the first employees on a project. As the actual construction ramps up, the general foreman determines the manpower needs and begins to either transfer employees in from other PCL projects, or contacts the Union's hiring hall for dispatches. For example, the former general foreman on the Vail project testified that he oversaw the transfer and hire of somewhere between 60 to 80 carpenter craft employees on 4 to 5 crews. This general foreman also testified that during construction, he had to seek replacements for approximately 15 to 20 unit employees for safety violations, productivity problems, or attendance issues.

During the course the project, if a general foreman determines he needs more manpower either because of project needs, or because employees have to be replaced, the general foreman will inform the superintendent that he is bringing in more manpower. If the general foreman is aware of other projects winding down from the superintendent meetings, he will contact those PCL projects to see if any core employees are available for transfer. If none are, the general foreman will call the Union's hiring hall to request the dispatch of employees. It appears that while the general foremen have and exercise the authority to directly call the hiring hall for dispatches, some superintendents make these phone calls instead of the general foremen.

With regard to the hiring hall, the Employer has negotiated with the Union for the right to request employees by name or by standard dispatch. There is no evidence regarding whether it is the general foremen or the superintendent who selects employees by name for dispatch. The record does establish, however, that on large

projects, the dispatched employees report directly to the general foreman who interviews them to make sure they have the tools and skills needed to perform the job for which they were dispatched. If the carpenter fulfills the requirements, the general foreman assigns him to a crew. If the carpenter does not meet the requirements, the general foreman can reject the dispatch and send the carpenter back to the hall and request a new dispatch. While the general foreman will inform the superintendent of what transpired, the general foreman does not need authorization from the superintendent to reject a dispatched carpenter.

As a project winds down, the general foreman informs the superintendent that employees will need to be laid off or transferred out to other projects. The superintendents only override the decision to lay off employees if they are aware of a portion of the project needing manpower that the general foremen have not yet been told about. The general foreman selects which specific employees will be retained and which will be laid off based on his assessment of the skills needed for the remainder of the project, and the productivity levels of the individual employees. The general foremen are not required to follow seniority or a policy such as “first in, first out” when determining who should stay and who should be laid off. The superintendents can override the decision of the general foremen, but this only happens in rare instances.

Finally, the general foremen have the authority to grant requests for a day or two off to employees, and do so regularly without consulting a superintendent. If an employee seeks a week off, the general foreman will usually consult with the superintendant before granting the request to determine if the project needs can be met while the employee is away. It appears that requests for long absences are rare given

the nature of the construction industry, but that requests for short absences occur regularly.

3. Authority to discipline, suspend or discharge employees:

The record evidence regarding the authority of general foremen to discipline employees is somewhat conflicting. While there was general testimony that the general foremen can give verbal and written warnings for minor safety violations, or for rule violations such as talking on a cell phone, they do not appear to have authority to act on their own regarding most disciplinary actions. The Employer has issued a warning handbook to the general foremen, which they carry with them. While a copy of that handbook was not introduced into evidence, the witness who testified to its existence indicated that it covers minor infractions such as tardiness or minor safety violations. If a general foreman believes a written warning is warranted, he fills out a Company warning form, signs it and has the employee sign it, and then staples the form to the employee's timecard. The form is sent to the personnel office to be placed in the employee's personnel file. While the general foremen are not required to seek authorization from a superintendent before issuing these written warnings, it is unclear how these written warnings affect the status and tenure of the employee. In this regard, Employer witnesses offered general testimony that the Employer has a progressive disciplinary policy, but there was not testimony regarding whether or how the verbal or written warnings given by the general foremen form the basis for harsher disciplinary measures. The record was clear that for any infraction warranting suspensions or discharge, the general foremen inform the superintendent and the superintendent makes the ultimate determination as to whether the employee will be suspended or

terminated. The former general foreman who testified that between 15-20 unit employees were let go on the Vail project stated that his recommendations for discipline were followed by the superintendent “for the most part.” If an employee commits a serious safety violation, foremen or general foremen must report it to the safety manager for investigation. While the general foremen participate in the investigation of these safety infractions and are asked for their disciplinary recommendations, the actual written warnings, suspensions, or discharges are handled by higher level managers.

Finally, while the Employer witnesses generally testified that the general foremen supervising specialty projects possess and exercise the same authority as a superintendent, there were no examples given of disciplinary action taken by a general foreman on a specialty project.

4. Authority to promote employees:

As a project ramps up, the general foremen decide when it is necessary to add crews, rather than just individuals. The general foremen assess the current employees and make recommendations to the superintendent as to which employees should be promoted to foremen. The superintendents generally accept the recommendation without further investigation. A current superintendent testified that while he was general foreman on the DIA project, he promoted about six employees to foremen positions. As noted, a promotion from journeyman to foreman results in a wage increase of \$1.50 per hour.

5. Authority to direct and assign work to employees:

Each crew has a foreman, who carries and works with tools the majority of the time, but also acts as the liaison for the crew to the general foremen regarding how the

work is progressing and whether there are manpower, safety, or material or equipment needs or problems. The foremen and their respective crews are assigned to a specific work area and given a schedule by the general foreman on a daily basis. The foreman will alert the general foreman if they encounter problems in their work area such as another craft not meeting its schedule, thereby holding up the crew. The general foreman will then decide whether to send the crew to another work area, or divide up the crew to other crews until their work can resume. The general foreman will inform the superintendent after the fact so that the superintendent can investigate why the other craft is not on schedule.

The general foremen have the authority to assign overtime to the unit employees. While the general foremen inform the superintendent that they are doing so, they do not need authorization from the superintendent. The overtime is usually done by the crew who is working in the particular area requiring overtime to stay on schedule. If an entire crew is not needed, or a larger crew is needed, the general foremen can decide which additional employees will be awarded the overtime, but they do not have the authority to compel an employee to work overtime. Finally, the general foremen determine how much overtime will be worked.

ANALYSIS AND FINDINGS

The Employer, contrary to the Petitioner, contends that the general foremen possess and exercise the Section 2(11) supervisory indicia to hire, transfer, suspend, layoff, promote, discharge, assign, discipline and direct employees. I will assess the parties' contentions in light of the following legal authority.

A. Applicable Legal Authority

1. Supervisory indicia under the Act

Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will establish supervisory status. *KGW-TV*, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive. Thus, an individual is not a supervisor unless the individual exercises supervisory authority with the use of independent judgment, and holds the authority in the interest of the employer. *Id.*

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people who do not exercise the 12 stated Section 2(11) indicia in a merely routine manner. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" - who enjoy the Act's protections even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful

not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See *KGW-TV*, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

2. The Board's recent decisions concerning supervisory status

Recently, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Board issued three decisions in which it refined and clarified the analysis to be applied in assessing supervisory status regarding assigning work, direction of work, and independent judgment: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

In *Oakwood*, the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. *Id.* at 692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Id.* at 693. The Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-

bargaining agreement[,]” but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. *Id.*

Additionally, the independent judgment that a putative supervisor exercises must “rise above the merely routine or clerical” for it to be truly supervisory within the meaning of Section 2(11). *Id.* at 693. As stated by the Board:

If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. *Id.*

In *Golden Crest*, *supra*, the Board also reaffirmed existing case law holding that for supervisory status to exist, the alleged supervisor’s authority with regard to Section 2(11) functions must include the power to require employees to undertake certain actions. The Board reiterated that supervisory authority is not established where the putative supervisor has the authority merely to request that an employee take a certain action. *Id.* at 729.

B. Application of legal authority to the facts

As noted above, the Employer asserts that the general foremen are supervisors within the meaning of Section 2(11) of the Act because they possess and exercise the following supervisory indicia:

- 1) Authority to hire, transfer, and layoff employees;
- 2) Authority to discipline, suspend or discharge employees;
- 3) Authority to promote employees;
- 4) Authority to responsibly direct employees and assign them work.

I will separately address each of these categories of supervisory indicia below. In sum, however, I find based on the above-cited authority, and the record as a whole, that the

Employer has met its burden of establishing that the general foremen have the authority in the interests of the Employer and use independent judgment to hire and layoff employees, promote employees, and to assign overtime and grant days off to employees. Accordingly, I find that the general foremen are statutory supervisors within the meaning of Section 2(11) of the Act, and I shall exclude them from the bargaining unit.

1. Authority to hire, transfer, and layoff employees:

I find that the most compelling evidence of supervisory indicia relates to the general foremen's authority to hire and lay off employees. In this regard, the record establishes that the general foremen have direct authority, with little more than a reportorial function to the superintendents, to determine when more manpower is needed on a project, and when manpower should laid off. Specifically, the general foremen contact other PCL jobsites to find out if carpenters are available for transfer, and if not, the general foremen contact the Union's hiring hall and specify the number and skills of the employees they need to have dispatched.

After carpenters are dispatched, the general foremen independently interview them to ascertain whether they possess the necessary tools and skills to fill the position to which they have been dispatched. If the general foreman determines the dispatched employee does not possess the necessary tools or skills the general foreman sends the individual back to the hall and requests another dispatch. While the general foreman may inform the superintendent of the situation, they are not required to seek authorization from the superintendent before performing any of these actions.

With regard to lay offs, I find that the general foremen utilize the requisite independent judgment contemplated by the Board in *Oakwood* to determine which employees should be kept and which will be laid off. In this regard, as a project winds down, the general foreman informs the superintendent that employees will need to be laid off or transferred to other projects. The superintendents only override the decision to lay off employees if they are aware of a portion of the project needing manpower that the general foremen has not yet been told about. The general foremen select which specific employees will be retained and which will be laid off based on an assessment of skills needed for the remainder of the project, and the productivity levels of the individual employees. The superintendent can override the decision of the general foreman, but this only happens in rare instances

With regard to transfers, however, I find that the record is insufficient to establish that the general foremen use independent judgment in the transfer process. In this regard, the record does not establish whether dispatched employees are ever transferred from one jobsite to another, or what input, if any, general foremen have in that decision making process. With regard to core employees, there is evidence that general foremen are involved in the transfer process for core employees based on the fact that the general foremen call other PCL jobsites to seek available carpenters. The record fails to establish whether the general foremen have any authority to reject core employees who are no longer needed on another jobsite, or whether such employees are automatically transferred if a general foreman needs manpower.

2. Authority to discipline, suspend or discharge employees:

I find that much of the evidence adduced by the Employer regarding general foremen's purported supervisory authority to discipline, suspend, or discharge employees is merely conclusory, and lacks the necessary evidence of the decision making factors to establish that the general foremen employ independent judgment in decision making as defined by the Board in *Oakwood*. It is well settled that such conclusory evidence is not sufficient to establish supervisory status. See e.g., *Golden Crest*, supra, at 731. In this regard, while the general foremen have the authority to issue verbal and written warnings for minor infractions, it appears they do so based on the written warning handbook issued to them by the Employer. In *Oakwood*, the Board determined that the use of proscribed rules or policies does not constitute independent judgment. Moreover, while the general foremen staple written warning forms to the employee's timecard for filing in the personnel files, the record fails to establish how or even if such written warnings affect an employee's status or tenure. The Employer's witnesses testified in conclusory fashion about the existence of a progressive discipline system, but there were no concrete examples of how that system works, or what, if any effect, the warnings issued by general foremen have. Finally, the record evidence clearly establishes that the general foremen do not have the authority to suspend or discharge employees, or to effectively recommend such actions.

Accordingly, I find that the Employer has failed to meet its burden of establishing that the general foremen possess and exercise the authority to discipline, suspend, or discharge employees.

3. Authority to promote:

The record establishes that as a project ramps up, the general foremen decide when it is necessary to add whole crews, rather than just individual employees. When this situation arises, the general foremen assess the current employees and make recommendations to the superintendent as to which employees should be promoted to foremen. The superintendents generally accept the recommendation without further investigation. A current superintendent testified that while he was general foreman on the DIA project, he promoted about six employees to foremen positions. Since the Employer has an established practice of promoting from within the ranks, I find that this ability to effectively recommend the promotion of journeymen to foremen constitutes supervisory authority within the meaning of Section 2(11) of the Act.

4. Authority to responsibly direct and to assign work:

a. Authority to responsibly direct

The Board in *Oakwood* held that for responsible direction to exist within the meaning of Section 2(11), the putative supervisor must direct and perform oversight of employees, and be accountable for the performance of tasks by those employees such that adverse consequences may befall the putative supervisor if the employees do not properly perform the tasks. See *Oakwood*, supra, at 692. Thus, embodied in the *Oakwood* "accountability" analysis, is the element that the putative supervisor must have the authority to take corrective action if an employee refuses such direction.

Specifically, the Board stated:

The person directing and performing oversight of [an] employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus,

to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id* at 691-692. [Emphasis added.]

I find that the record evidence is insufficient to establish the requisite accountability factor required under *Oakwood*. In this regard, the Employer did not offer any evidence establishing that the general foremen face the prospect of adverse consequences if the work is not performed on time by the carpenter crews. While the general foremen do assign the foremen and their respective crews to specific work areas and give the foremen a schedule for the day’s work, it appears that the foremen have the principle responsibility for directing the day-to-day work of their respective crews.

b. Authority to assign work

The Board in *Oakwood* construed the Section 2(11) term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Oakwood*, *supra*, at 689. Specifically, the Board stated: “[T]o ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” *Id*.

The record establishes that the general foremen will meet with the foremen at the start of the day and assign each crew to a specific work area. During the course of the day the foremen will alert the general foreman if they encounter problems in their work

area such as another craft not meeting its schedule, thereby holding up the crew. The general foreman will then decide whether to send the crew to another work area, or divide up the crew to other crews until their work can resume. The general foreman will inform the superintendent after the fact so that the superintendent can investigate why the other craft is not on schedule. The record further establishes that the general foremen have the authority to assign overtime to keep the project on schedule. In this regard, the general foremen have the authority to determine when overtime is necessary, how much overtime will be needed, and who will work it. While the foremen will report the need for overtime to the superintendent, they do not need authorization from the superintendent. Overtime work is usually done by the crew who is working in the particular area requiring overtime to stay on schedule. However, if an entire crew is not needed, or a larger crew is needed, the general foremen can decide which additional employees will be awarded the overtime.

On the basis of the foregoing, I find that the general foremen possess and exercise their supervisory authority to assign work and overtime to unit employees. I do note, that the use of independent judgment by the general foremen regarding overtime is somewhat muted by the fact that under the collective-bargaining agreement, unit employees cannot be compelled to work overtime. I nonetheless determine that because a general foreman can determine the amount of overtime needed, and which crews or individuals will work the overtime unless someone refuses, the general foremen's level of authority is sufficient to support my finding that they have the authority within the meaning of Section 2(11) to assign overtime.

There are approximately 30 core employees in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.⁶ Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

⁵ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

⁶ Based on the stipulation of the parties and applicable Board authority, I find that the **Daniel/Steiny** eligibility formula is applicable. Accordingly, those eligible to vote shall also include those employees in the unit found appropriate who have been employed 30 working days or more within the 12 months, or who have had some employment within that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

Carpenters District Council of Kansas City and Vicinity

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 600 17th Street, 700 North Tower, Dominion Plaza, Denver, CO, 80202, on or before **June 21, 2010**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's website, **www.nlrb.gov**,⁷ or by

⁷ To file the list electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The

facsimile transmission to (303) 844-6249. The burden of establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. See *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **June 28, 2010, at 5 p.m. Eastern Time**, unless filed electronically. **Consistent with**

user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Board's web site, **www.nlr.gov**.

the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁸

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions.

The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

⁸ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Dated at Denver, Colorado, this 14th day of June, 2010

Wanda Pate Jones, Regional Director
Wanda Pate Jones, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Towers
Denver, Colorado 80202-5433